STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEROME DEWRIGHT LEWIS,

Defendant-Appellant.

UNPUBLISHED
March 29, 2005

No. 252508
Wayne Circuit Court
LC No. 03-004266-02

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EARL ANTHONY JOHNSON,

Defendant-Appellant.

No. 252510
Wayne Circuit Court
LC No. 03-004266-01

Before: Fort Hood, P.J. and Griffin and Donofrio, JJ.

PER CURIAM.

In this consolidated appeal, defendants Jerome Dewright Lewis and Earl Anthony Johnson were each convicted of three counts of armed robbery, MCL 750.529, three counts of kidnapping, MCL 750.349, one count of assault with intent to do great bodily harm less than murder, MCL 750.84, two counts of assault with a dangerous weapon, MCL 750.82, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, after a joint jury trial. The court sentenced defendant Lewis to concurrent terms of 135 months' to thiry years' in prison for the first two counts of armed robbery, 185 months' to thirty years' in prison for the third count of armed robbery, 135 months' to thirty years' in prison for the first two counts of kidnapping, 185 months' to thirty years' in prison for the third count of kidnapping, three to ten years' in prison for the assault with intent to do great bodily harm less than murder conviction, two to four years in prison for both counts of assault with a dangerous weapon, but consecutive to a and two year term of imprisonment for the felony-firearm conviction.

The court sentenced defendant Johnson to concurrent terms of 126 months' to thirty years' in prison for the first two counts of armed robbery, 180 months' to thirty years' in prison for the third count of armed robbery, 126 months' to thirty years' in prison for the first two counts of kidnapping, 180 months' to thirty years' in prison for the third count of kidnapping, three to ten years' in prison for the assault with intent to do great bodily harm less than murder conviction, two to four years in prison for both counts of assault with a dangerous weapon, but consecutive to a two year term of imprisonment for the felony-firearm conviction. Both defendants appeal their jury trial convictions as of right. Because we do not find any of their arguments persuasive, we affirm.

During the afternoon of March 17, 2003, Jeffrey Norman received a phone call from defendant Lewis, an acquaintance, asking for marijuana. Norman and defendant Lewis had a history of calling one another if they needed marijuana and had occasionally gotten together socially. On the afternoon in question, Norman and his girlfriend, Melissa Kessler, did not have any marijuana but were already planning to meet Brandon McTurner who they believed would supply them with marijuana. Norman told defendant Lewis that he could come along and agreed to pick him up on their way to acquire the marijuana. Kessler drove Norman in her vehicle to meet defendant Lewis at the Key Manor Apartments in Romulus. On arriving at the apartments, defendant Lewis got into the back seat of the car and asked if his cousin, defendant Johnson, could come as well. Norman and Kessler agreed, and defendant Johnson also entered the vehicle.

As Kessler began pulling out of the complex parking lot, each defendant brandished a gun, pointed it at Norman's neck, and told him to empty his pockets. Initially, Norman thought they were joking and asked if it was some sort of game. Defendants responded that they were serious and they would kill him if he did not comply. Norman turned over his cell phone and his cash. Defendants then demanded Kessler's cash, which she immediately turned over to defendants. Defendants were not pleased with their cache, accused them of hiding something, and then told Norman to call "his boy" McTurner. With the guns still at his neck Norman feared for his life and called McTurner to set up a meeting to purchase marijuana. McTurner agreed to bring four ounces of marijuana and planned to meet at Scores Lanes in Taylor, which was the location selected by defendants. Defendants then ordered Norman to call McTurner again and ask him how much marijuana he had available. McTurner said he had about eight ounces and agreed to bring it.

En route to the bowling alley, Kessler stopped at a gas station because they were running low on fuel. Defendant Lewis went in and paid and Kessler pumped the gas into her car. They returned to the road and reached Scores Lanes. Kessler parked in the middle of the parking lot. Defendants told Norman to get out of the car and told Kessler that if she left, called the police, or made a scene, they would kill Norman. Defendants tucked their guns into their pants and walked with Norman into the bowling alley.

McTurner arrived and parked next to Kessler's car after defendants and Norman were inside the bowling alley. McTurner asked where Norman was through his window and Kessler said he was inside the bowling alley. Defendants went outside planning to take McTurner's drugs and money. However, they just walked up to him and asked him for a cigarette which he provided. Defendants then reentered the bowling alley and told defendant to call McTurner and tell him to get into Kessler's car. Norman complied and called McTurner directing him to wait

for him in Kessler's car because he was using the restroom. McTurner got out of his car and got into Kessler's car.

Defendants then jumped into the backseat of the car, pulled out their guns, pointed them at McTurner and told him to empty his pockets. McTurner relinquished two cell phones. Defendants then asked where his car was and for the keys. McTurner gestured toward his car and handed over his keys. McTurner tried to get out of the car, but the passenger door was broken and could not be opened normally from the inside. McTurner tried to fight with the door but could not open it and defendants told him to cooperate or they would kill him. Defendant Johnson exited Kessler's car, got into McTurner's vehicle, and began to drive to the area behind the bowling alley. Still in Kessler's car, defendant Lewis kept the gun pointed at McTurner's neck and told Kessler to follow defendant Johnson. Kessler followed defendant Johnson behind the bowling alley and parked.

When they parked McTurner tried again to get out of the car. Defendant Lewis had the gun pointed directly at the back of his lower neck and pulled the trigger three times, but the gun did not fire. McTurner eventually got the window of the passenger door down and was able to open the door from the outside and get out of the vehicle. Defendant Lewis grabbed a hold of McTurner, and McTurner's shirt ripped as he eventually freed himself and ran away. Defendant Lewis got out of the car and yelled that McTurner got away to defendant Johnson who was searching the trunk or McTurner's car. Defendant Lewis then got into the front seat of Kessler's car and defendant Johnson got into the back seat. Meanwhile, McTurner ran into the bowling alley and asked the manager to call 911.

Defendants told Kessler to drive so she did. With the guns on their laps, defendants gave her direction where to go and what speed to travel, telling her they would kill her and her daughter if she did not comply. Kessler was hysterical and they told her to stop crying. About five or six police cars passed them on the road going in the opposite direction toward the bowling alley. Defendants told her to pull into the parking lot of a CVS and she did. Defendant Lewis grabbed at rings Kessler was wearing, but they were tight and would not come off. Warning her not say anything, they got out of the car. Kessler drove away in the direction of the bowling alley to find the police. When Kessler reached the bowling alley she talked to the police and told them where she had dropped off defendants and some officers headed in that direction. While Kessler spoke to the police, Norman walked out of the bowling alley, saw Kessler crying, and walked over to her and also talked to the police.

Defendants entered CVS and asked to call a taxi. Tricia Morton, and another CVS employee, Kevin Manetta, thought defendants were acting suspicious and Morton called the police. The police arrived and apprehended both defendants. Police recovered two guns, two cell phones, a pager, money, and suspected marijuana.

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Defendant Lewis first argues that the trial court abused its discretion when it admitted prior consistent statements under MRE 801(d)(1)(B) and thereby denied defendant Lewis a fair and impartial trial. We review the trial court's determination of evidentiary issues for abuse of discretion. *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003). Because he raised a timely objection, defendant Lewis preserved his challenge to the admission of the

victims' statements.[1] MRE 103(a)(1); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). A preserved nonconstitutional evidentiary error does not require reversal unless it involves a substantial right, and, on review of the entire case, it is more probable than not that the error was outcome-determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

MRE 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(d) provides that some statements are not hearsay and are not barred by the general rule against hearsay. Among these statements are certain prior consistent statements. MRE 801(d)(1)(B). Generally, no one may bolster a witness' testimony using that witness' prior consistent statements unless the statements fall under a hearsay exception or are not admitted as substantive evidence. *People v Hallaway*, 389 Mich 265, 275-276; 205 NW2d 451 (1973); *People v Rosales*, 160 Mich App 304, 308; 408 NW2d 140 (1987). To be admissible, a prior consistent statement must meet the following requirements of MRE 801(d)(1)(B):

> (1) the declarant must testify at trial and be subject to cross-examination; (2) there must be an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony; (3) the proponent must offer a prior consistent statement that is consistent with the declarant's challenged in-court testimony; and, (4) the prior consistent statement must be made prior to the time that the supposed motive to falsify arose. [*People v Jones*, 240 Mich App 704, 706-707; 613 NW2d 411 (2000), quoting *US v Bao*, 189 F3d 860, 864 (CA 9, 1999).]

Defendant Lewis argues that the trial court misinterpreted MRE 801(d)(1)(B) for two reasons: (1) that there were no allegations of recent fabrication, but rather the witnesses were attacked based upon the lies made during their initial contacts with the police shortly after the incident, and (2) all statements were made after the motivation for fabrication arose, i.e. the fear of the possibility of getting in trouble due to the marijuana involved. A review of the challenged testimony reveals that defendants' counsel questioned the victims to a great extent on the fact that they had initially failed to tell the police about the drug sale. Defense counsel's questions during trial directly inferred that since the victims had lied to the police initially, that their testimony now given in court before the jury was a lie. Defense counsel noted in questioning before the jury that McTurner was not charged with any crimes, obtained an admission of that fact, and created an inference of recent fabrication for preferential treatment. In effect, defense counsel "opened the door" to put into evidence the remainder of the statements and to rehabilitate the witnesses. Thus, the prosecutor's questions to the witnesses regarding prior consistent statements were proper to rebut the inference that their trial testimony was a recent fabrication. The omission by the victims of their own criminal enterprise does not demonstrate or create a motive to lie or fabricate defendants' commissions. At the time of the initial statements by the victims, as introduced by defense counsel, no motives existed for the victims to fabricate. If defendant Lewis' assertion that motive for fabrication is the victims' fear of

[1] The objection is less than clear, but we accord preservation nonetheless.

prosecution, the motive is negated by the mere fact of the victims' willingness to call, and talk to the police. Further, if fear is the motive then the victims simply need not have called or talked to the police. Therefore, statements made by the victims are necessarily pre-motive because no motive is established at that time.

We also note that defendant Lewis is correct in his assertion that consistent statements made after the motive to fabricate arose are inadmissible hearsay. *People v McCray*, 245 Mich App 631, 642; 630 NW2d 633 (2001). However, as noted, both Kessler and McTurner made their statements to the police immediately after the incident, prior to any motive to fabricate arose. As defendant Lewis points out, there were illegal narcotics involved in this case, but Kessler and McTurner were neither facing charges in connection with this case at that time, nor were they implicating defendants in a narcotics transaction. Kessler and McTurner were victims in the case who were simply giving witness statements to the police. Because the prior consistent statements were made pre-motive and met the remaining requirements of MRE 801(d)(1)(B), they were admissible and the trial court did not abuse its discretion. *McLaughlin, supra*, 258 Mich App 649.

Defendant Lewis next argues that there was insufficient evidence to convict him of kidnapping with intent to extort money. A challenge to the sufficiency of the evidence is reviewed de novo and in a light most favorable to the prosecution to determine whether any rational factfinder could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002); *People v Knowles*, 256 Mich App 53, 57-58; 662 NW2d 824 (2003).

The elements of a forced confinement kidnapping are: (1) forcible confinement of the victim within the state; (2) done willfully, maliciously, and without lawful authority; (3) against the will of the victim; and, 4) "an asportation of the victim which is not merely incidental to an underlying crime *unless* the crime involves murder, extortion or taking a hostage. Asportation incidental to these types of crimes is sufficient asportation for a kidnapping conviction." *People v Wesley*, 421 Mich 375, 388; 365 NW2d 692 (1984); see also *People v Vaughn*, 447 Mich 217, 225; 524 NW2d 217 (1994), overruled in part on other grounds, *People v Carines*, 460 Mich 750, 766; 597 NW2d 130 (1999).

Defendant Lewis argues that he did not have the requisite "specific intent" for a jury to convict him of kidnapping. However, forcible confinement kidnapping does not require a showing of specific intent. *People v Jaffray*, 445 Mich 287, 298; 519 NW2d 108 (1994). Our review of the record reveals that sufficient evidence existed to establish defendant Lewis acted willfully, maliciously, without lawful authority, and with the necessary general intent. The record evidence at trial showed that upon entering Kessler's car, defendant Lewis pulled out a gun, pointed it at Norman and stole both Kessler's and Norman's cash and belongings. Defendant Lewis then forcibly directed them to drive him to Scores Lanes so he could also victimize McTurner, all the while keeping his gun on Norman. Defendant Lewis did not allow Kessler and Norman to leave when they stopped on the way to the bowling alley to get gas. At Scores Lanes, defendant Lewis used Norman as a pawn to lure in McTurner and kept Kessler confined in her automobile against her will under the threat that he would kill her boyfriend, Norman, despite the fact that she no longer had anything of value. Defendant Lewis continued to threatened Norman and used him to stall and then direct McTurner to wait in Kessler's car. Once McTurner was in the car, defendant Lewis threatened him at gunpoint, transported him to a

less public location behind the bowling alley, and confined him in the car against his will even after he had given up his belongings only until he was able to escape. Finally, after defendants obtained all the victims' cash, drugs, and other belongings, they did not let Kessler go and instead forced her to drive them to a getaway location. This was all done without any of the victims' consent. This evidence is sufficient for a reasonable juror to find that defendant Lewis acted willfully, maliciously, and without lawful authority. It also satisfies the general intent requirement for forcible confinement kidnapping for all three victims. *Jaffray, supra*, at 298; *Wesley, supra,* 421 Mich 388.

Defendant also challenges the trial court's scoring of his sentencing guidelines, specifically, Offense Variable 10 (OV-10) and Offense Variable 12 (OV-12). Pursuant to MCL 769.34(10), because defendant Lewis has raised this issue in a proper motion to remand, it is preserved for our review. Although we review for clear error the trial court's factual findings at sentencing, we will uphold the trial court's scoring of the sentencing guidelines if there is any evidence in the record to support it. *People v Babcock,* 469 Mich 247, 264-265; 666 NW2d 231 (2003); *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

Defendant contends that he is entitled to resentencing because the court's scoring of both OV-10 and OV-12 were clearly erroneous as a matter of law. In calculating OV-10, exploitation of a vulnerable victim, a court must assess 15 points if "predatory conduct was involved." MCL 777.40(1)(a). According to the statute, "predatory conduct" is defined as "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). After reviewing the record, we agree with the trial court's assessment of 15 points for OV-10.

The record evidence displays that defendant Lewis' activities during the commission of the crimes at issue plainly displayed "predatory conduct" as defined in the statute. Defendant Lewis lured Kessler and Norman to an apartment complex to pick him up under the guise that he would ride along and pick up marijuana for personal use from McTurner, Norman and Kessler's contact. Upon arriving, defendant Lewis secured an invitation for defendant Johnson. Working in tandem, defendants immediately revealed guns, threatened both Kessler's and Norman's lives, and robbed Norman and Kessler at gunpoint. The crimes and victimization continued as defendants, through threats and intimidation, forced Kessler and Norman to become part of the plot to victimize, rob, and threaten the life of McTurner. Defendants used Norman and Kessler as essentially decoys to call McTurner and lure him to the bowling alley, stall him, and then get him out of his car and into Kessler's so he could also be victimized. The preoffense behavior in seeking out victims for the specific purpose of committing a crime against them, and forcing them to become involved in the crime itself, was clearly predatory within the meaning of the statute. Therefore, the trial court did not clearly err in assigning 15 points for OV-10. See *People v Witherspoon*, 257 Mich App 329, 334-336; 670 NW2d 434 (2003).

In calculating OV-12, contemporaneous felonious criminal acts, a court must assess 25 points if "three or more contemporaneous felonious criminal acts involving crimes against a person were committed." MCL 777.42(1)(a). According to the statute, "a felonious criminal act is contemporaneous if both of the following circumstances exist: (1) the act occurred within 24 hours of the sentencing offense, and; (2) the act has not and will not result in a separate conviction." MCL 777.42(a)(i) and (ii). Defendant Lewis argues and we agree that he was charged and convicted of multiple counts in relation to the crimes at issue in the instant case and

since the prosecutor has not presented any evidence that he had any other charges pending against him for that same 24 hour period, the scoring of OV-12 should have been zero.

Pursuant to the statute, points cannot be scored in both OV-12 and OV-13, continuing pattern of criminal behavior, unless the offense committed relates to membership in an organized criminal group. MCL 777.43. During sentencing, defense counsel pointed out that either OV-12 or OV-13, could be scored, but not both. MCL 777.43(2)(c). Defendant's counsel stated that he would like the change made to OV-13, and as a result of that conversation, the trial court scored OV-12 at 25 points and zeroed out OV-13. Clearly the record displays that "the offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(b). As such, the trial court should have scored OV-13 at 25 points. Because the net change in the guidelines' scoring is zero, and defendant Lewis' sentence falls with in the appropriate guidelines sentence range, we will not disturb it. MCL 769.34(10).

Defendant next contends that the trial court failed to adequately instruct the jury regarding the required intent element of aiding and abetting. At the close of its jury instructions the trial court specifically asked: "[A]re you satisfied with the reading of the jury instructions on behalf of Mr. Johnson?" Defendant Lewis, through his counsel, stated: "On behalf of Mr. Lewis, yes, Judge." "By expressly approving the instructions, defendant has waived this issue on appeal." *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002); see also *People v Carter*, 462 Mich 206, 215-219; 612 NW2d 144 (2000). A defendant who waives his or her right under a rule may not seek appellate review of a claimed deprivation of that right. The waiver extinguishes any error. *Carter, supra* at 215, quoting *United States v Griffin*, 84 F3d 912, 924 (CA 7, 1996).

Finally, defendant Lewis has filed a supplemental brief pursuant to Administrative Order No. 2004-6 (Standard 4) replacing Administrative Order No. 1981-7 (Standard 11). Defendant Lewis raises only one issue in his brief, that he should be granted a new trial because he was denied the effective assistance of counsel at trial. Defendant Lewis, acting *in propria persona*, made a motion for a new trial or *Ginther*[2] hearing raising the issue of ineffective assistance of counsel, thus preserving the issue for this Court's review. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). However, because the trial court did not hold an evidentiary hearing, this Court's review is limited to the facts on the record. *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003); *Wilson, supra*, at 352.

To demonstrate ineffective assistance, a defendant must show that his attorney's performance fell below an objective standard of reasonableness and resulting prejudice. *People v Kimble*, 470 Mich 305, 314; 684 NW2d 669 (2004). Defendant Lewis makes broad claims in his brief on appeal, but seems to argue that his counsel did not adequately investigate or prepare the case for trial. Defendant Lewis does not support his argument by any reference to the record, and our review of the record does not show that counsel failed to fully investigate the case. Further, the record does not indicate any apparent prejudice. For those reasons, defendant Lewis has not sustained his claim of ineffective assistance of counsel.

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[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Defendant Johnson first argues that there was insufficient evidence to convict him of kidnapping with intent to extort money. Again, a challenge to the sufficiency of the evidence is reviewed de novo and in a light most favorable to the prosecution to determine whether any rational factfinder could have found that the essential elements of the crime were proved beyond a reasonable doubt. *Hunter, supra,* 466 Mich 6; *Knowles, supra,* 256 Mich 58.

As stated above, the elements of a forced confinement kidnapping are: (1) forcible confinement of the victim within the state; (2) done willfully, maliciously, and without lawful authority; (3) against the will of the victim; and, 4) "an asportation of the victim which is not merely incidental to an underlying crime unless the crime involves murder, extortion or taking a hostage. Asportation incidental to these types of crimes is sufficient asportation for a kidnapping conviction." *Wesley, supra,* 421 Mich 388, see also *Vaughn, supra,* 447 Mich 225, overruled in part on other grounds, *Carines, supra,* 460 Mich 766.

Defendant Johnson brings the same argument that defendant Lewis asserted, that he did not have the requisite "specific intent" for a jury to convict him of kidnapping. We note, again, that forcible confinement kidnapping does not require a showing of specific intent. *Jaffray, supra,* 445 Mich 298. Because defendants acted in tandem to accomplish this crime, our review of the record and attendant analysis of the issue results in the same conclusion. Our review of the record reveals that sufficient evidence existed to establish defendant Johnson acted willfully, maliciously, without lawful authority, and with the necessary general intent.

The record evidence at trial showed that upon entering Kessler's car, defendant Johnson pulled out a gun, pointed it at Norman and stole both Kessler's and Norman's cash and belongings. Defendant Johnson then forcibly directed them to drive him to Scores Lanes so he could also victimize McTurner, all the while keeping his gun on Norman. Defendant Johnson did not allow Kessler and Norman to leave when they stopped on the way to the bowling alley to get gas. At Scores Lanes, defendant Johnson used Norman as a pawn to lure in McTurner and kept Kessler confined in her automobile against her will under the threat that he would kill her boyfriend, Norman, despite the fact that she no longer had anything of value. Defendant Johnson continued to threatened Norman and used him to stall and then direct McTurner to wait in Kessler's car. Once McTurner was in the car, defendant Johnson ransacked McTurner's automobile while defendant Lewis threatened McTurner at gunpoint and confined him in the car against his will even after he had given up his belongings only until he was able to escape. Finally, after defendants obtained all the victims' cash, drugs, and other belongings, they did not let Kessler go and instead forced her to drive them to a getaway location. This was all done without any of the victims' consent. This evidence is sufficient for a reasonable juror to find that defendant Johnson acted willfully, maliciously, and without lawful authority. It also satisfies the general intent requirement for forcible confinement kidnapping for all three victims. *Jaffray, supra,* at 298; *Wesley, supra,* 421 Mich 388.

Defendant Johnson next argues that prosecutorial misconduct denied him a fair trial. This Court reviews claims of prosecutorial misconduct by examining the remarks in context to determine whether the remarks denied defendant a fair trial. *People v Bahoda,* 448 Mich 261, 266-267; 531 NW2d 659 (1995); *People v Rodriguez,* 251 Mich App 10, 32; 650 NW2d 96 (2002). Because defendant Johnson failed to object to the prosecutor's conduct below, we

review his unpreserved claims for plain error affecting substantial rights. *Carines, supra*, at 460 Mich 763-764, 774.

Defendant Johnson specifically argues that large portions of the prosecutor's closing statement amounted to improper vouching. A prosecutor may not ask the jury to convict a defendant on the basis of the prosecutor's personal knowledge or the prestige of his office, *People v Reed*, 449 Mich 375, 398; 535 NW2d 496 (1995), nor may a prosecutor vouch for the credibility of witnesses to the effect that he has some special knowledge concerning a witness' truthfulness. *Bahoda, supra,* 448 Mich 276. A prosecutor may, however, argue from the facts that the defendant or another witness is not worthy of belief. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *People v Callon,* 256 Mich App 312, 329; 662 NW2d 501 (2003).

We have reviewed the challenged remarks, and when we consider them in context and evaluate them in light of defense arguments and their relationship to the evidence presented at trial, we conclude that no error occurred. It was defense counsel's theory of the case that the victims lied to the police. The prosecution was rebutting the defense argument that Kessler, Norman, and McTurner were motivated to lie. The prosecutor's remarks were not inappropriate because the comments were no more than a response to defense counsel's theory of the case and related argument. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977). Further, a review of the challenged comments reveals that the prosecution was arguing that the facts and evidence taken as a whole demonstrated the victims were credible. Accordingly, the prosecution did not improperly vouch for the credibility of the victims. *Launsburry, supra,* 217 Mich App 361.

Additionally, we note that the trial court instructed the jury that the arguments and comments of the lawyers were not evidence, thereby dispelling any prejudice. *Bahoda, supra,* 448 Mich 281. Consequently, we find no error requiring reversal with respect to the prosecutor's comments at closing argument.

Defendant Johnson argues that his right to a fair jury trial was violated when the prosecutor purposefully excluded African-Americans from the jury. This Court reviews for abuse of discretion a trial court's ruling regarding discriminatory use of peremptory challenges. *People v Ho*, 231 Mich App 178, 184; 585 NW2d 357 (1998). In doing so, we must give great deference to the trial court's findings because they turn in large part on a determination of credibility. *Harville v State Plumbing & Heating, Inc*, 218 Mich App 302, 319-320; 553 NW2d 377 (1996). This issue was properly preserved for our review because defense counsel made a timely objection during trial.

In order to make a showing of discrimination in jury selection, courts are guided by the United States Supreme Court decision of *Batson v Kentucky*, 476 US 79, 84-88; 106 S Ct 1712; 90 L Ed 2d 69 (1986). *Batson* counsels that first, the defendant must show that he is a member of a cognizable racial group; that the prosecutor used purposeful discrimination; and the defendant, using the facts and circumstances, must show the prosecutor was engaged in this practice to exclude members of the same race as the defendant. *Id.*, at 96-97. Once the defendant makes a prima facie showing, the burden shifts to the State to provide a neutral explanation for challenging the jurors in question. *Id.*, at 97. The prosecutor therefore must

articulate a neutral explanation related to the particular case to be tried. *Id*., at 98. Merely denying a discriminatory motive or saying it was done in good faith is not enough. *Id*.

In the trial court below, after defendant Johnson objected to the prosecutor's use of peremptory challenges the trial court called upon the prosecutor to provide race-neutral reasons for the use of the peremptory challenges. The trial court found the prosecutor's reasons to be race-neutral. Bearing in mind that as the Supreme Court stated, "trial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination," the only question before us is whether the prosecutor's explanation is sufficient. *Batson, supra,* 476 US 97.

On appeal, defendant Johnson specifically argues that the prosecutor attempted to systematically remove African American jurors from the jury panel when she used seven of her nine peremptory challenges to excuse African American jurors. Our review of the record reveals that the prosecutor provided race-neutral reasons for utilizing her peremptory challenges in the manner she did. The prosecutor offered the following reasons: two jurors had been to court with family members that had been charged with gun crimes; two more were elderly, one seemed to have problems hearing and appeared to be sleeping at one point, and the other indicated a reluctance to serve on the jury to the officer-in-charge before trial; one was a social worker and it was the prosecutor's practice to exclude social workers; another had previously served on a murder trial in the same court; and finally, one juror knew family members of one of defendants from church.

After reviewing the record, and giving great deference to the trial court's findings, we conclude that the prosecutor provided a race-neutral explanation for all the peremptory challenges used that was related to the circumstances of the case at bar. *Batson, supra,* 476 US 97; *Harville, supra,* 218 Mich App 302. Accordingly, defendant Johnson's claim that his rights were violated by the prosecution's exercise of peremptory challenges to dismiss African American jurors is without merit.

Defendant Johnson next argues that he is entitled to resentencing because the court's scoring of OV-12 was clearly erroneous as a matter of law. To preserve an issue challenging the scoring of the sentencing guidelines for appellate review, a party must raise the issue at or before sentencing or demonstrate that the challenge was brought as soon as the inaccuracy could reasonably have been discovered. MCR 6.429(C); *People v Cain,* 238 Mich App 95, 129; 605 NW2d 28 (1999). Defendant Johnson did not challenge the scoring of the guidelines at or before sentencing, and his attorney indicated that he had reviewed the sentencing guidelines, had nothing to add, and had no objections. After the prosecutor indicated that she believed OV-12 should be scored at 25 instead of 10, defendant Johnson's counsel stated on the record, "[t]hat's correct." Therefore, defendant has not preserved the scoring challenge for appeal. MCR 6.429(C); *Cain, supra*, at 129.

Nonetheless, this Court may review an unpreserved sentencing guidelines issue for plain error affecting substantial rights. *People v Kimble*, 252 Mich App 269, 275-276; 651 NW2d 798 (2002), citing *Carines, supra*, 460 Mich 763-764. The defendant bears the burden of establishing both plain error and prejudice, and reversal is not warranted unless the error seriously affected the fairness, integrity or public reputation of judicial proceedings. *Kimble, supra*, at 277-278, citing *Carines, supra,* at 763.

Defendant Johnson contends that he is entitled to resentencing because the court's scoring of OV-12 was clearly erroneous as a matter of law. As stated above, in calculating OV-12, contemporaneous felonious criminal acts, a court must assess 25 points if "three or more contemporaneous felonious criminal acts involving crimes against a person were committed." MCL 777.42(1)(a). According to the statute, "a felonious criminal act is contemporaneous if both of the following circumstances exist: (1) the act occurred within 24 hours of the sentencing offense, and; (2) the act has not and will not result in a separate conviction." MCL 777.42(2)(a)(i) and (ii). Defendant Johnson argues and we agree that he was charged and convicted of multiple counts in relation to the crimes at issue in the instant case and since the prosecutor has not presented any evidence that he had any other charges pending against him for that same 24 hour period, the scoring of OV-12 should have been zero.

Although, identical to defendant Lewis, the points should have been scored in OV-13. Again, pursuant to the statute, points cannot be scored in both OV-12 and OV-13, continuing pattern of criminal behavior, unless the offense committed relates to membership in an organized criminal group. MCL 777.43. Clearly the record displays that "the offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(b). As such, the trial court should have scored OV-13 at 25 points. Because there is no change in the guidelines' total scoring, and defendant Johnson's sentence falls with in the appropriate guidelines sentence range, defendant Johnson has not displayed plain error. MCL 769.34(10); *Kimble, supra*, 252 Mich App 277-278, citing *Carines, supra*, 460 Mich 763.

Finally, defendant Johnson argues that trial court erred when it sentenced him based on facts not supported by the jury verdict in contravention of the United States Supreme Court's recent decision in *Blakely v Washington*, 542 US ___; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, in *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004), our Supreme Court addressed the impact of *Blakely* on our sentencing system. The Court noted that the sentencing system addressed in *Blakely* was a determinate sentencing system as opposed to Michigan's indeterminate sentencing system and that the holding in *Blakely* was designed to protect defendants from higher sentences based on facts not found by a jury. *Id*. The Court then reasoned that, because the maximum sentence under Michigan's sentencing system is set by law and the trial judge cannot exceed it, the holding in *Blakely* did not affect our system. *Id*. Defendant Johnson's *Blakely* challenge is nothing more than a pro forma appeal without factual development or analysis. Consequently, the trial court did not err in the assignment of guidelines scoring and did not consider facts found outside the record in making its sentencing determination.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Richard Allen Griffin
/s/ Pat M. Donofrio